U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDDIE FRANKLIN and U.S. POSTAL SERVICE,
TREMONT STATION, Brooklyn, NY

Docket No. 98-1240; Submitted on the Record;
Issued December 14, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective November 9, 1997; and (2) whether the Office properly denied appellant's request for a review of the written record.

On October 8, 1994 appellant, then a 53-year-old letter carrier, injured his lower back while delivering a parcel. Initial employing establishment treatment records indicate that appellant was treated for low back pain and that he had a preexisting history of low back pain. Appellant stopped work on the date of the original injury and returned to work on October 31, 1994. By letter dated December 30, 1994, the Office accepted the claim for lumbosacral sprain and paid appropriate benefits.

On January 11, 1995 appellant filed a notice of recurrence of disability, Form CA-2a, alleging that while he was boxing mail on November 14, 1994, he sustained a recurrence of disability due to his October 8, 1994 employment injury. Appellant did not return to work.

A magnetic resonance imaging (MRI) scan dated February 6, 1995 revealed disc herniation at L5-S1 level, disc bulge at L4-5 level. In a report dated February 15, 1995, Dr. Irving Liebman, a Board-certified orthopedic surgeon, who had been treating appellant since his original injury, opined that appellant was unable to work as a result of injuries sustained on October 8, 1994.

By letter dated October 10, 1995, the Office accepted appellant's claim for recurrence of disability commencing November 14, 1994. The Office paid appropriate compensation.

Appellant continued under the care of Dr. Liebman. An October 25, 1996 MRI scan revealed mild disc desiccation with a large left posterior disc herniation at L5-S1 level causing encroachment of the left S1 nerve root. Dr. Liebman performed examinations of appellant on October 28, December 3, 1996 and February 6 and March 12, 1997 and continued to find

appellant totally disabled. In his December 3, 1996 report, Dr. Liebman recommended lumbar laminectomy. He opined that there continued to be tenderness, a spasm and restriction of lumbosacral motion. Dr. Liebman further noted that the MRI scan revealed evidence of a herniated disc and opined that appellant was totally disabled. He repeated these conclusions in the February 6 and March 12, 1997 reports. In a June 17, 1997 report, based on an examination of appellant, Dr. Liebman diagnosed tenderness, a spasm and restriction of lumbosacral motion. He noted that the straight leg test was positive on the left and concluded that appellant was totally disabled.

On June 25, 1997 appellant was examined by Dr. Harry Shen, a Board-certified internist, at the request of Dr. Liebman. Dr. Shen opined that appellant had chronic back pain "apparently" related to the October 8, 1994 employment injury and had a history of herniated disc with some degenerative disc disease. He concluded that appellant would benefit from participation in an inpatient pain program at the hospital for joint diseases.

The Office referred appellant and a statement of accepted facts to Dr. Lawrence E. Miller, a Board-certified orthopedic surgeon. Dr. Miller examined appellant on August 28, 1997. Based on his evaluation, he concluded that appellant's lumbosacral strain and sprain had resolved and that there was no disability and no need for further treatment. Dr. Miller believed that appellant was capable of working full-time and resuming full activities with no restrictions or limitations. Dr. Miller added:

> "Even though there was a positive MRI [scan] and the complainant was complaining of pain down his left leg, there is no clinical evidence of a herniated disc in the lumbosacral spine, as none of the pains could be reproduced down either one of his legs on examination…. The claimant's subjective complaints are not supported by objective findings, as there are no nerve endings going from the left flank down into the left ankle and, therefore, his pain cannot be explained on the basis of known physiological mechanisms."

By letter dated September 11, 1997, the Office issued a notice of proposed termination of compensation. Based on Dr. Miller's report, the Office concluded that appellant no longer had a continuing disability as a result of the October 8, 1994 employment injury.

By decision dated October 15, 1997, the Office terminated compensation benefits, finding that appellant had recovered from any compensable injury.

On December 22, 1997 appellant requested an examination and/or reconsideration of the written record by an Office hearing representative. In support, appellant submitted medical evidence, including the results of prior MRI scans and reports from Drs. Liebman and Shen.[1] Appellant argued that the Office erred in not considering an October 4, 1997 report from

[1] With his request, appellant submitted both evidence that had been previously submitted and new reports from Dr. Liebman. The Board cannot consider the new evidence on appeal as the Office has not considered such evidence in reaching a decision; *see* 20 C.F.R. § 501.2(c).

Dr. Liebman and in finding that Dr. Miller's report was sufficient to justify terminating his compensation.

By letter dated February 12, 1998, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record as it was not timely. The Office noted further considering the request, but found that appellant could have the matter equally well addressed by requesting reconsideration from the Office.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits after November 9, 1997 based on Dr. Miller's report.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment. Thus, the burden of proof is on the Office rather than the employee with respect to the period subsequent to the date when compensation is terminated or modified.[2] In the present case, the Office accepted appellant's claim for a lumbar sprain.

The Board notes that the Office properly terminated appellant's compensation effective November 9, 1997 in that the weight of the medical evidence at the time of such termination was represented by the thorough, well-rationalized opinion of Dr. Miller.[3] The opinion of Dr. Miller established that appellant did not have a continuing condition or disability due to his October 8, 1994 employment injury, accepted for a lumbar sprain. Dr. Miller provided medical rationale for his opinion by explaining that appellant exhibited extremely limited findings on examination and diagnostic testing which did not warrant a finding that he had any continuing residuals of the lumbosacral strain of October 8, 1994. In contrast, while Dr. Liebman noted findings on physical examination, he failed to provide an opinion specifically addressing causal relationship, on how appellant's disability was due to the accepted lumbar sprain. While Dr. Liebman provided a diagnosis of an L5-S1 disc, his reports do not contain an adequate explanation of how appellant's lumbar disc condition was caused or aggravated by the accepted employment injury. Likewise, while Dr. Shen noted an "apparent" link between appellant's back condition and a work-related injury, his opinion is speculative.[4] For the reasons stated above, the Board finds that Dr. Miller's report constitutes the weight of medical opinion evidence and is sufficient to establish that appellant's disability related to his October 8, 1994 lumbar sprain ceased by November 9, 1997.

The Board further finds that the Office properly denied appellant's request for a review of the written record but should have considered appellant's simultaneous request for reconsideration.

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[2] *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989); *Edwin L. Lester*, 34 ECAB 1807 (1983).

[3] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[4] *See Roger Dingess*, 47 ECAB 123 (1995); *Carl E. Sims*, 40 ECAB 679 (1989).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.[5] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[6] As appellant's request for a review of the written record was postmarked December 22, 1997, more than 30 days after the date of the Office's October 15, 1997 decision, appellant was not entitled to a review of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely, the Office has discretionary authority with respect to such a request and the Office must exercise such discretion. In the February 12, 1998 decision, the Office advised appellant that it had considered the matter in relation to the issue involved and the request was denied on the grounds that appellant could resolve the issue by requesting reconsideration and submitting relevant evidence. This is considered a proper exercise of discretionary authority. There is no evidence of an abuse of discretion in this case.

The Board further finds, however, that appellant's December 22, 1997 letter was not solely a request for review of the written record. In his letter, addressed to the Branch of Hearings and Review, appellant also requested "reconsideration" of his claim and submitted additional evidence not previously considered by the Office in its October 15, 1997 decision. It is apparent that appellant made a simultaneous request for reconsideration under section 8128(a) and section 8124.

In *Mary G. Allen*,[7] the Board noted that, when a request for a hearing under section 8124(b)(1) and for reconsideration under section 8128 of the Act are simultaneously made, "the Office must properly consider a claimant's request for a hearing first to avoid creating a conflict with the requirements of section 8124(b)(1), that a hearing may be granted only before review under section 8128(a)."[8] In *Allen*, the Board remanded the case to the Office since it had not considered appellant's request for reconsideration under section 8128(a) following the denial of a hearing by the Branch of Hearings and Review. Accordingly, the case will be remanded to the Office for consideration of appellant's pending request for reconsideration under section 8128(a) of the Act.

The decisions of the Office of Workers' Compensation Programs dated February 12, 1998 and October 15, 1997 are hereby affirmed. The case is remanded for an appropriate decision on appellant's reconsideration request.

[5] 5 U.S.C. § 8124(b); 20 C.F.R. § 10.131(b).

[6] *See Charles J. Prudencio,* 41 ECAB 499, 501 (1990).

[7] 40 ECAB 190 (1988).

[8] 5 U.S.C. § 8124(b)(1).

Dated, Washington, D.C.
December 14, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Willie T.C. Thomas, Alternate Member, dissenting:

The Office of Worker's Compensation Programs terminated appellant's benefits on the opinion of a referral physician who had examined appellant on only one occasion and found appellant to have recovered from his employment injuries. The Office initially accepted a lumbosacral sprain. Appellant subsequently returned to work but filed a notice of recurrence of disability on January 11, 1995 contending that the disability recurred and was causally related to the accepted October 8, 1994 employment injury.

Appellant submitted a report of a magnetic resonance imaging (MRI) scan of the lumbar spine findings dated February 6, 1995, interpreted by Dr. Thomas M. Kolb as revealing "[d]isc herniation at the L5-S1 level. Disc bulge at the L4-5 level."

Appellant also submitted a report by his treating physician, Dr. Irving Liebman, dated January 21, 1995. In this report, he reported appellant to be totally disabled and requested authorization to perform an MRI scan of the lumbar spine to rule out a herniated lumbar disc. Dr. Liebman reported the results of the above-referenced MRI scan in a report of an examination on March 2, 1995. Therein, he noted that appellant had a flare-up of severe pain in the low back with radiation to the left leg; that physical examination revealed marked tenderness, a spasm and restriction of lumbar motion. Straight leg raising was reported as positive at 150 degrees on the left. Dr. Liebman concluded that appellant continued to be totally disabled, that he required treatment and requested authorization to fit appellant with a "low [k]night spinal brace."

In a decision dated August 10, 1995, the Office accepted appellant's recurrence claim as causally related to the accepted injury of October 8, 1994.

The most recent reports of Dr. Liebman are dated October 28 and December 3, 1996 and March 12, 1997. In the October 28, 1996 report, he reported that appellant continued to complain of pain in the lower back with radiation into the lower extremity. Dr. Liebman reported that appellant required treatment at the emergency room of the Brooklyn Veterans

Administration Hospital on October 22 and 25, 1996. He noted continued tenderness, a spasm and restriction of lumbosacral motion with positive straight leg raising on the left. Dr. Liebman reported that appellant continued to be totally disabled and required therapy three times a week. In his December 3, 1996 report, Dr. Liebman reported that an MRI scan of the lumbar spine performed at the Brooklyn Veterans Administration Hospital on October 25, 1995 revealed "a large left posterior disc herniation at L5-S1, causing encroachment on the left S1 nerve." Dr. Liebman requested authorization to refer appellant to the Joint Diseases Orthopaedic Institute Pain Management Center for an evaluation and treatment.

In his March 12, 1997 report, Dr. Liebman noted 10 percent restriction of motion of the lumbar spine with spasm, tenderness and straight leg raising positive at 100 degrees on the left. He again noted that appellant continued to be totally disabled and required treatment.

The record contains an initial evaluation report by Dr. Harry Shen of the Joint Diseases Orthopaedic Institute Pain Management Center dated June 25, 1997. His initial impression was as follows:

> "*Impression*: The patient has chronic back pain. He has a history of a herniated disc at L5-S1 with some degenerative disc disease. He also has a significant history of hypertension.
>
> "*Recommendation*: The patient's situation was briefly discussed with him and he would appear to be an appropriate candidate for the impatient component of the [p]ain [p]rogram here at the Hospital for Joint Diseases. In particular, the patient could benefit from a regular exercise program including stretching exercises and he could clearly benefit a great deal from instruction in relaxation techniques and stress management techniques. His case will be discussed further with my colleagues and final recommendations will be made subsequent to such discussion."

The Office referred appellant for a second opinion examination by Dr. Lawrence E. Miller, a Board-certified orthopedic surgeon. In a report dated August 28, 1997, he made a diagnosis of "[r]esolved lumbosacral strain and sprain. His comment was as follows:

> "Based on the history given by the claimant, there appears to be a causal relationship between the accident and the original injury.

"Even though there was a positive MRI [scan] and the claimant was complaining of pain down his left leg, there is no clinical evidence of a herniated disc in the lumbosacral spine, as none of the pain could be reproduced down either one of his legs on examination."

* * *

"The claimant's subjective complaints are not supported by the objective findings, as there are no nerve endings going from the left flank down into the left ankle and, therefore, his pain cannot be explained on the basis of known physiological mechanism. Based on clinical examination, there is no disability and no need for any further treatment, testing or physiotherapy: his medical condition is satisfactory. There also is no need for any transportation, medical equipment or household help.

"The claimant is capable of working on a full-time basis and resuming full activities, with no restrictions, or limitations; he has reached his maximum medical improvement. There is no permanency to the claimant's injuries and the prognosis is good."

The Office in a decision dated October 15, 1997 terminated appellant's benefits based on Dr. Miller's one-time examination and medical report dated August 27, 1997.

From even a cursory review of the total evidence of record, it is very obvious that MRI scans performed at various times at different facilities have been interpreted as showing the appellant has a herniated disc at L5-S1 with nerve root involvement and has not undergone any type of surgery to correct this condition. Dr. Miller, while acknowledging the positive MRI scans, simply concluded the herniated disc with nerve root involvement had resolved since he could not reproduce symptoms on his physical examination. He therefore concluded that all disability had ceased and there was no need for further therapy, medical treatment, household care or transportation assistance.

Dr. Miller's report is clearly at odds with Dr. Shen's report and diametrically opposed to the numerous reports of Dr. Liebman and the Brooklyn Veterans Administration Hospital. Section 8123(a) of the Federal Employees' Compensation Act requires the appointment of an impartial medical specialist when there is disagreement between appellant's physician and the physician of the government. It is very clear that this was not even considered before appellant's benefits were terminated.

Not only were the clear terms of section 8123(a) of the Act violated, a clear miscarriage of justice has befallen appellant based on acknowledged objective MRI scan findings but ignored in favor of questionable clinical findings of inability to reproduce pain down either extremity.

For the foregoing reasons, I feel compelled to respectfully dissent from the decision of the majority in a clear violation of the Act by the Office and approval of such action on appeal to this Board.

Willie T.C. Thomas
Alternate Member